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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-1245**

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
*Petitioner,*

*vs.*

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN MUTUAL INSURANCE ALLIANCE, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND AMERICAN INSURANCE ASSOCIATION

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## INTEREST OF THE AMICI CURIAE[1]

The membership of the American Mutual Insurance Alliance, National Association of Independent Insurers and American Insurance Association (hereafter the "Associations") constitute most of the property and casualty insurers in the United States.[2]

1. Pursuant to Supreme Court Rule 42(2), this brief is being filed with written consents from all parties.

2. Liberty Mutual Insurance Company is a member of the American Mutual Insurance Alliance, but is not a member of the National

The American Insurance Association has approximately 140 member companies, the National Association of Independent Insurers approximately 400 member companies and the American Mutual Insurance Alliance approximately 100 member companies, all of whom are property and casualty insurers. Because the Associations, therefore, have considerable experience with insurance coverage, they are desirous of presenting their views. The Associations' presentation, rather than duplicate the arguments advanced by the Petitioner, will address the insurance concepts which they believe relevant to the issue at bar.

Association of Independent Insurers or the American Insurance Association.



## ARGUMENT

The California disability income system that was before this Court in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), functioned in the same manner as a private disability insurance policy. It was predicated on a desire to provide a broad illness and injury program within the limited financial resources available. Given this objective, since pregnancy disability coverage is, as this Court recognized in *Aiello,* "extraordinarily expensive" (417 U. S. at 493), it is a risk that cannot be included without inequitably distorting the benefits available to the insured group. The majority of non-pregnant persons, both male and female, would have to subsidize a sub-group consisting of pregnant women. The addition of the risk of pregnancy would, "in the name of equity, create an even greater program imbalance in favor of women over men." *Aiello* v. *Hansen,* 359 F. Supp. 792, 802 (N. D. Cal. 1973) (dissent of Williams, D. J.), *rev'd, Geduldig* v. *Aiello, supra.*[3] This result, it is submitted, would be contrary to the objective of Title VII: to provide equality rather than to create an advantage or provide compensatory relief for either sex. Equality in this case must be measured in terms of relative cost and aggregate risk coverage. Under these tests, Liberty's pregnancy exclusion cannot be found to be discriminatory *per se* or to be based on a "pretext designed to effect an invidious discrimination." *Aiello,* 417 U. S. at 496-497, n. 20.

The Liberty plan provides for equal premiums on behalf of all employees without regard to gender. All employees are also

3. Title VII only ". . . seeks to equalize opportunity, not create an advantage for either men and women. If Congress wishes to legislate in favor or pregnant women [it may] . . . ." *Gilbert* v. *General Electric Company,* ..... F. 2d ....., No. 74-1557 (4th Cir. June 27, 1975), *pet. for cert. pend.,* Nos. 74-1589 and 74-1590 (dissenting opinion of Widener, C. J.).

provided with equal coverage "in terms of aggregate risk protection . . . there is no risk from which men are protected and women are not [or vice-versa]." *Aiello,* 417 U. S. at 496-497. Nor can there be any assertion that plan benefits are distributed disproportionately. Indeed, one of the insurance's industry most out-spoken critics, Herbert S. Denenberg, former Commissioner of Insurance for the State of Pennsylvania, admitted in this testimony to Congress that:

> Disability coverage poses the most difficult problem [to unisex rates] as the loss experience of women, *even with pregnancy costs excluded,* may run two and a half times higher than costs for men.[4]

Viewed in terms of overall cost this means that:

> Assuming that women comprise 38% to 40% of the work force under a typical disability income plan, the cost for the benefit [covering pregnancy] would amount to about a 40% to 50% increase in the employer's current cost.[5]

In actual experience this has been the result. In 1973 the Hawaii Temporary Disability Insurance Law was amended to include pregnancy and the termination of pregnancy under the definition of "disability".[6] As a result, the Equitable Life Assurance Society of the United States was required to adjust its rates for private plans certified by the State. While the premium rate for male employees remained at $3.24 per month, the rate for female employees, which, at $4.00 per month, was already 23% higher than the male rate, was increased another 119% to $8.76 per female employee.[7] Using this example, and assuming that an employer has 40% female employees, the inclusion of the risk of pregnancy would increase the employer's overall cost 53%.[8] If the employee complement was 50% female, the increased cost would be 65%. Stated differently, the foregoing representative figures illustrate that one of every three dollars in premiums would be paid to cover pregnancy and over two of every three dollars would be paid to cover females as a group.

One need not rely, however, solely on increased premium costs calculated by private insurers to demonstrate that, even without pregnancy coverage, females normally receive an advantage under most disability income plans. Statistics which substantiate this conclusion are available from public authorities. According to the United States Department of Health, Education and Welfare, the incidence of acute conditions, days of restricted activity and days of disability all indicate that females are consistently more vulnerable.[9] Examining the experience of

4. Report of the Proceedings of the Hearings on the "Economic Problems of Women" before the Joint Economic Committee of Congress, Vol. 3 (July 12, 1973), p. 198 (emphasis added).

5. Thomas J. Gillooly, Associate General Counsel, Health Insurance Association of America, "The Developing Issue of Sex Discrimination in Insurance—An Overview", paper presented to The Association of Life Insurance Counsel, on May 6, 1974 at White Sulphur Springs, West Virginia.

6. 4 Hawaii Rev. Stat., Title 21, Sections 392-3.

7. These figures are fully corroborated by the experience of General Electric Co. and American Telephone and Telegraph Company presented to this Court in their briefs *amicus curiae* in *Geduldig* v. *Aiello, supra.*

8. Assuming women comprise 40% of a work force, the calculation would be:

(1) (40%) ($8.76) + (60%) ($3.25) = 5.45
(2) (40%) ($4.00) + (60%) ($3.25) = 3.55
(3) 5.45 − 3.55 = 1.90
(4) 1.90 − 3.55 = 53.5%

9.

1971—Incidence of Acute Conditions Per 100 Persons Per Year by Age

| | Averages | 17-44 Years | 45 Years & Older |
|---|---|---|---|
| Males | 207.8 | 185.1 | 107.2 |
| Females | 228.5 | 225.5 | 135.6 |

With regard to days of restricted activity, days of bed disability and days lost from work, the result is the same.

1971—Days of Restricted Activity Per 100 Persons Per Year by Age

| | All Ages | 17-44 Years | 45 Years & Older |
|---|---|---|---|
| Males | 792.9 | 714.1 | 673.7 |
| Females | 965.0 | 923.4 | 980.4 |

the State of Rhode Island, which attempted to include pregnancy within the definition of "disability" in a state plan in 1943, the results are startling. By 1949-1950 "the pregnancy claims constituted 22.62 per cent of all claims[10] and 30.4 per cent of all benefits paid [almost one of every three dollars]."[11] The severe drain on benefit dollars had to be curtailed through strict limits on pregnancy claims. The estimates and experience of other states with disability income programs further confirms the actuarial necessity of either wholly excluding the risk of pregnancy from coverage, or, at least, placing strict limits on the payment of benefits for pregnancy-related causes.[12]

Days of Bed Disability Per 100 Persons Per Year by Age

| | All Ages | 17-44 Years | 45 Years & Older |
|---|---|---|---|
| Males | 339.3 | 297.2 | 270.3 |
| Females | 431.0 | 429.3 | 339.2 |

Days Lost From Work Associated Per 100 Currently Employed Persons Per Year by Age

| | All Ages | 17-44 Years | 45 Years & Older |
|---|---|---|---|
| Males | 315.0 | 331.3 | 289.7 |
| Females | 378.0 | 395.4 | 350.1 |

U. S. Dept. of H. E. W., *Vital and Health Statistics Series*, "Current Estimates—1971" (Series 10, No. 79), Tables 2, 5, and 6. To the same effect, see the same publication for the year 1972 (Series 10, No. 85), Tables 2, 5, 6 and 8; and the *Source Book of Health Insurance Data 1973-1974* (Health Insurance Institute).

10. Liberty's evidence indicated that if pregnancy had been a covered risk in recent years under its policy claims would have risen 25-26%. See Joint Appendix, p. 190.

11. See Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N. Y. L. F. 480, 485 (1971).

12. In New York, the State estimates that the inclusion of the risk of pregnancy in its disability coverage would result in an additional $100 million dollars in benefits or a 35 percent increase. Since the statutory amendment in Hawaii (see text at n. 6, *supra*), 33% of the claims have been related to pregnancy. See letters of April 19, 1974 and April 11, 1974 from the Attorney Generals of California and New Jersey filed with this Court in *Geduldig* v. *Aiello, supra.* Including the risk of pregnancy, California estimated that while a man would average receipt of $.80 in benefits for every dollar he paid in contributions, an average woman would receive $2.33 for each dollar paid in contributions—a 250 to 300 percent disparity. See Appellant's brief in *Geduldig* v. *Aiello, supra*, p. 26.



The necessity of utilizing such cost and actuarial principles to determine the propriety of decisions involving insurance coverage becomes apparent when an attempt is made to construct standards by which insurance policies can be measured. Surely, an employer (1) whose disability insurance coverage is limited to the primary "acute conditions" as defined by H. E. W.—respiratory conditions, parasitic and infective diseases, and digestive system conditions and injuries, (2) who pays equal premiums on behalf of males and females, and (3) whose female and male groups of employees receive proportional shares of the benefits paid out cannot be said to have violated Title VII simply by excluding the risk of pregnancy from its coverage. The question then becomes, what factor is different for the employer, like Liberty Mutual, whose insurance covers a wide range of risks but not pregnancy? If, as in Liberty Mutual's policy, the premiums are equal, the "aggregate risk" coverage is equal, and there is no claim that the distribution of benefits to males and females is dissimilar, the Associations submit that there is no distinction. Either both employers have violated Title VII or neither have. Like age[13] and prior health history, pregnancy provides a legitimate basis for the exclusion of certain

13. Under the Age Discrimination Act, the Department of Labor states (29 C. F. R. 860.120):

> A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive lesser . . . benefits. . . .

risks.[14] The significant factor is not that pregnancy is unique to females but that pregnancy disabilities are unique from an insurers' perspective in terms of cost and risk.

14. As one commentator noted with respect to an equivalent actuarial situation, the dissimilar life expectancies of each sex does not mean "that an individual woman employee can . . . claim a higher lump sum death benefit as a term of employment on the ground that women in general live longer than men in general." The commentator further observed:

> Life expectancy is a characteristic that is not related, in the normal sense, to job capability. Being branded as a member of a sex with a greater life expectancy is not quire the same as being the victim of a debilitating stereotype, such as the case with driver safety. Moreover, requiring employers to make unequal contributions on the basis of sex may create a wage cost incentive to them to hire those employees whose sex means lower premium contributions.
>
> Given the monolithic structure of the insurance industry in this regard, and the almost universal desirability of life insurance, most employees without a group policy would purchase life insurance on their own if money were provided by the employer, and in the process would face sex discrimination. Thus, when the employer merely consolidates the process, and effects a savings available through group coverage, the sex discrimination seems more a fact of life than an invidious discrimination.

Comment, *Developments—Title VII*, 84 Harv. L. Rev. 1109, 1174-5 (1971).



## CONCLUSION

The proper application of sound actuarial principles in molding an insurance benefit package provides the best method of making non-discriminatory benefit coverage decisions. These principles prevent inequitable subsidization of one group to the detriment of others allowing "[t]he fiscal and actuarial benefits of the program [to] accrue" (*Aiello*, 417 U. S. 497, n. 20) to all employees equally and distributing equitably the premium savings inherent in group coverage. The Associations respectfully submit that the failure of the lower courts to appreciate these principles has led to an erroneous decision which must be reversed.

Respectfully submitted,

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